MALAYSIAN REPORTS

Tuang Pik King v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor

HIGH COURT (PENANG) – CRIMINAL APPLICATION NO 54-10-88
EDGAR JOSEPH JR J
19 NOVEMBER 1988

Constitutional Law – Writ of habeas corpus ad subjiciendum – Application for – Applicant not detained at detention centre stipulated in detention order – Amendments made to Internal Security Act 1960 depriving detainee of plea of defective detention order as to wrong detention centre – Effect of – Whether detention violated art 7(1) of Federal Constitution – Activities alleged against applicant – Whether they were activities prejudicial to the security of the country or breaches against public order only – Internal Security (Amendment) Act 1988, ss 3 & 5(1) – Internal Security Act 1960, s 8(1) – Federal Constitution, arts 5(1) & 7(1)

Preventive Detention – Applicant not detained at detention centre stipulated in detention order – Amendments made to Internal Security Act 1960 depriving detainee of plea of defective detention order as to wrong detention centre – Effect of – Whether detention violated art 7(1) of Federal Constitution – Activities alleged against applicant – Whether they were activities prejudicial to the security of the country or breaches against public order only – Internal Security (Amendment) Act 1988, ss 3 & 5(1) – Internal Security Act 1960, s 8(1) – Federal Constitution, arts 5(1) & 7(1)

The applicant prayed for a writ of habeas corpus ad subjiciendum whereby he challenged both the validity of a detention order issued against him under s 8(1) of the Internal Security Act 1960 ('the principal Act') and his detention thereunder. In the affidavit evidence, it was stated that although the detention order stipulated that the applicant was to be detained at the Tempat Tahanan Perlindungan, Taiping for a period of two years from 27 December 1987, the applicant had in fact been detained for the initial part of this period at the Police Remand Centre at Empat Centre. In the course of hearing the application, the court considered ss 3 and 5(1) of the Internal Security (Amendment) Act 1988 ('the amendment Act') which stated that 'no detention order shall be invalid or inoperative by reason that the person to whom it relates was immediately after the making of the detention order detained in any place other than a place of detention referred to in s 8(3) ...' and that 'a detention order ... made ... against any person during the period between the date of the commencement of the principal Act and the commencement of this Act ... (is) hereby declared lawful and valid ...'.

In this application, the applicant contended that: (a) his detention violated art 7(1) of the Federal Constitution which stated that 'no person shall be punished for an act or omission which was not punishable by law when it was done or made ...'; and (b) the ground for his detention did not come within the scope of the enabling legislation as the activities alleged against the applicant amounted to breaches of public order only and not the security of the country.

Held, dismissing the application:

(1) Article 7(1) prohibits retrospective penal legislation and is applicable only to criminal matters. The object of the legislature enacting ss 3 and 5(1) of the amendment Act was to nullify the decision of the Supreme Court in the case of *Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* v *Koh Yoke Koon*[1] and so to deprive a detainee of the sort of plea raised in that case even in respect of a detention order under s 8 of the principal Act made between the date of commencement of the principal act and the commencement of the amending Act. Sections 3 and 5(1) do not create offences, much less render acts of a detainee offences which were not offences before he did them. They merely immunize from judicial review detention orders which suffer from the defects suffered therein.

(2) The ground for the applicant's detention had been categorically stated to be his involvement in activities which would incite racial sentiment among the various races of the people in this country and so threaten national security. Such a ground is plainly within the scope and ambit of the enabling legislation, namely, s 8 of the principal Act.

[*Editorial Note*: The applicant has appealed to the Supreme Court vide Civil Appeal No 91 of 1988.]

Cases referred to

1 *PP* v *Koh Yoke Koon* [1988] 2 MLJ 301 (distd)
2 *Loh Kooi Choon* v *Government of Malaysia* [1977] 2 MLJ 187 (folld)
3 *Re Tan Boon Liat* [1976] 2 MLJ 83 (refd)
4 *Karam Singh* v *Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129 (folld)
5 *Minister for Home Affairs, Malaysia & Anor* v *Karpal Singh* [1988] 2 MLJ 29 (refd)

Legislation referred to

Dangerous Drugs (Special Preventive Measures) Act 1985
Federal Constitution arts 5(1), 7(1)
Internal Security Act 1960 s 8(1)
Internal Security (Amendment) Act 1988 ss 3, 5(1)

Lee Min Choon (*Chooi Shee Hong* with him) for the applicant.

Mohd Raus bin Sharif, Senior Federal Counsel, for the respondents.

Cur Adv Vult

Edgar Joseph Jr J: The applicant Dr Tuang Pik King was, at all material times, the headmaster of a Confucian Private Secondary School and the vice chairman of the United Chinese School Teachers Association.

He prays for a writ of habeas corpus ad subjiciendum whereby he challenges both the validity of a detention order dated 24 December 1987, issued under the hand of the Minister for Home Affairs ('the Minister') against him pursuant to the provisions of s 8(1) of the Internal Security Act 1960 ('the principal Act'), and his detention thereunder.

The impugned order (T4) was in the following terms:

> That I, the Minister of Home Affairs, being satisfied that the order is necessary to be imposed on the person named below with a view to preventing him from acting in any manner prejudicial to the security of Malaysia.
>
> Name: Tuang Pik King Nric No 3837021 (B)
>
> By reason therefore and in exercising the powers conferred on me pursuant to s 8(1) Internal Security Act 1960, I

hereby order that the person abovenamed be detained for two years from 27 December 1987 at the Tempat Tahanan Perlindungan Taiping or at any other place that may be ordered by me from time to time.

Signed 24 December 1987

sgd Dato' Seri Dr Mahathir bin Mohamad
Menteri Hal Ehwal Dalam Negeri, Malaysia

The ground upon which the impugned order was made (T5) was as follows:

That since the year 1986, you, Tuang Pik King, have been involved in activities that would incite the racial sentiments among the various races of the people in this country. All your activities could have threatened the national security.

The allegations of fact upon which the impugned order was based (the allegations of fact: T-5) were as follows:

1 That on 2 November 1986 while in a speech at a meeting held at the main lecture hall of University Kebangsaan, Bangi, you have incited the racial sentiment of the Chinese with the allegation that the national education policy formed by the Malay nationalists only based on the language, culture and religion of the Malays only, but had neglected the language, culture and religion of other communities.

2 That on 10 April 1987, during the annual general meeting of GPCSCI held at Lorong Tuanku Abdul Rahman, Kuala Lumpur, you had incited the racial sentiment amongst the Chinese by urging the government not to carry on with the New Economic Policy (Dasar Economi Baru) because you claimed that the said policy only benefited one race only.

3 That on 16 July 1987 during a speech at a meeting held at the Selangor Chinese Assembly Hall, Jalan Maharaja Lela, Kuala Lumpur, you claimed that the action by the government to amend the Education Act 1961 will jeopardize the rights of Chinese people to learn the Chinese language.

4 That on 4 October 1987, in a gathering with the Board of Directors of the School, Parents and Teachers Association, Chinese Primary School Old Boy's Association of Selangor and Federal Territory at Selangor Chinese Assembly Hall, Jalan Maharaja Lela, Kuala Lumpur, you had incited the spread of racial sentiments amongst the Chinese by proposing that classes in Chinese primary schools ought to be boycotted if the issue of appointing the headmaster and senior assistant to headmaster without the qualification of Mandarin Chinese primary school is not settled by the government.

5 That on 5 October 1987, during a speech at one meeting held at the Selangor Chinese Assembly Hall, Jalan Maharaja Lela, Kuala Lumpur, you had used the issue of appointing the headmaster and senior assistant headmaster without the qualification of Mandarin in the Chinese primary school in order to incite the racial sentiment of the Chinese.

6 That on 8 October 1987, in a meeting attended by 15 Chinese Guilds and Association and 3 political parties at Selangor Chinese Assembly Hall, Jalan Maharaja Lela, Kuala Lumpur, you had incited the racial sentiment of the Chinese by proposing that classes in the Chinese primary school ought to be boycotted if the issue of appointing the headmaster and senior assistant headmaster without the qualification of Mandarin in Chinese primary school is not settled by the government.

7 That on 11 October 1987 in a meeting attended by 15 Chinese Guilds and Association and 3 political parties at Thean Hou Temple, Kuala Lumpur, you had incited the racial sentiment of the Chinese by proposing that classes in the Chinese primary school ought to be boycotted if the issue of appointing the headmaster and senior headmaster without the qualification of Mandarin in Chinese School is not settled by the government.

8 That on 12 October 1987, in an emergency meeting of the Chinese School Board of Directors Association of Selangor and Federal Territory at Selangor Chinese Assembly Hall, Kuala Lumpur, you had incited the racial sentiment of the Chinese by proposing that the classes in the primary school ought to be boycotted if the issue of appointing the headmaster and senior assistant headmaster without the qualification of Mandarin in Chinese primary school is not settled by the government.

Before me, counsel for the applicant mounted an argument based on two grounds which may be stated broadly and summarily thus: firstly, it was said that the applicant's detention violated art 7(1) and, secondly, that the ground for his detention did not come within the scope of the enabling legislation.

I shall take firstly the point concerning art 7(1) which reads:

> No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.

Now, having regard to the affidavit evidence, two facts were plain:

(1) the period during which the applicant had been detained pending inquiries under s 73 of the principal Act was from about 1 am on 28 October 1987 to about 1.30 pm on 28 December 1987 and so exceeded the maximum permissible period for this purpose by about thirty-six hours;

(2) although the copy of the detention order served upon the applicant stipulated that he was to be detained at the Tempat Tahanan Perlindungan, Taiping, Perak, for a period of two years with effect from 27 December 1987, he had, in fact, been detained for the initial part of this period, that is to say, from at or about 1 am on 27 December 1987 to at or about 2.30 pm on 28 December 1987, at the Police Remand Centre at Empat Centre at Empat Tin, Kampong Batu, Jalan Ipoh, Kuala Lumpur.

In these circumstances, but for the provisions of ss 3 and 5(1) of the Internal Security (Amendment) Act 1988 ('the amending Act'), the applicant's contention that his continued detention was not in accordance with the law and therefore in violation of the fundamental right guaranteed under art 5(1) of the Constitution would be unassailable: see *PP* v *Koh Yoke Koon*.[1]

For convenience, I shall reproduce ss 3 and 5(1) of the amending Act; they read as follows:

> 3 The principal Act is amended by inserting after section 8 a new section 8A as follows:
>
> 8A No detention order shall be invalid or inoperative by reason –
>
> (a) that the person to whom it relates –
> (i) was immediately after the making of the detention order detained in any place other than a place of detention referred to in section 8(3);
> (ii) continued to be detained immediately after the making of the detention order in the place in which he was detained under section 73 before his removal to a place of detention referred to in section 8(3), notwithstanding that the maximum period of such detention under section 73(3) had expired; or
> (iii) was during the duration of the detention order on journey in policy custody or any other custody to a place of detention referred to in section 8(3); or
>
> (b) that the detention order was served on him at any place other than the place of detention referred to in section 8(3), or that there was any substantial defect relating to its service upon him.
>
> 5(1) Where a detention order was made under section 8(1) of the principal Act against any person during the period between the date of the commencement of the principal Act and the commencement of this Act (hereinafter referred to as 'the transitional period'), the detention order and the detention effected in pursuance thereof during the transitional period, and its continuation thereafter, if any, are hereby declared lawful and valid, and shall be deemed to be, and to have always and at all times been, lawful and valid, notwithstanding that at any time during the duration of the detention order he was detained at any place other than the place of detention referred to in section 8(3) of the principal Act, or continued to be detained in the place in which he was detained under section 73 of the principal Act after the expiry of the maximum period provided therefor under section 73(3) of the principal Act, or was on journey in policy custody or any other custody to the place of detention as aforesaid, or that there was any delay in the service of the detention order on him, or that it was served on him at any place other than the place of detention, or that there was any defect relating to its service upon him.

I regret I find counsel's submission totally unacceptable.

Clearly, cl (1) of art 7 prohibits retrospective penal legislation and is applicable only to criminal matters as was rightly conceded on behalf of the accused in the case of *Loh Kooi Choon* v *Government of Malaysia*.[2]

It is equally clear that the object of the legislature, enacting ss 3 and 5(1) aforesaid, was to nullify the decision of the Supreme Court in the case of *PP* v *Koh Yoke Koon*[1] and so to deprive a detainee of the sort of plea raised in that case even in respect of detention orders under s 8 of the principal Act made between the date of commencement of the principal Act and the commencement of the amending Act.

In other words, ss 3 and 5(1) do not create offences much less render acts of a detainee offences which were not offences before he did them; instead, they merely immunize from judicial review detention orders which suffer from the defects described therein. Consequently, art 7(1) is utterly irrelevant to the question for decision and no protest under it can possibly succeed.

I shall next take counsel's second point, which it will be recalled was that the ground for the applicant's detention did not come within the scope of the enabling legislation. In particular, it was submitted that the activities alleged against the applicant, even if true, offended 'public order' within the meaning of *Re Tan Boon Liat*[3] but not the security of the country and so did not come within the scope of the principal Act. To illustrate, counsel invited my attention to the provisions of the Dangerous Drugs (Special Preventive Measures) Act 1985, including the recital thereto, which he considered emphasized the point that acts which merely amounted to breaches of public order were not covered by the principal Act.

Accordingly, counsel invited me to hold that since the powers of preventive detention under s 8(1) of the principal Act could not be invoked in respect of acts which merely touch public order, the Minister had, in this case, acted ultra vires the powers conferred upon him.

Now, turning to the affidavit in opposition affirmed by the Minister on 15 July 1988, it was alleged therein, inter alia, and I quote:

> I was satisfied that the applicant's detention was necessary with a view to preventing him from acting in a manner prejudicial to the security of Malaysia, and I accordingly made the detention order. I did apply my mind to the facts of the applicant's case, and I state that the detention order against the applicant was made in good faith and after being satisfied that his detention was necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof.

The Minister had, however, conceded that of the eight allegations of fact levelled against the applicant, one of them, namely, allegation 5, which concerned the issue of headmasters and senior assistant teachers not qualified in Mandarin, had been included 'by my officer in error'. But, he had gone on to say that 'notwithstanding the error, I would have been no less satisfied that the applicant's detention was necessary with a view to preventing him from acting in a manner prejudicial to the security of Malaysia'.

It is obvious, therefore, that the ground for the applicant's detention had been categorically stated to be his involvement in activities which would incite racial sentiment among the various races of the people in this country and so threaten national security. Such a ground

is plainly within the scope and ambit of the enabling legislation, namely, s 8 of the principal Act, and nothing more need be said about the point.

As for the allegations of fact, having regard to the decision of the Federal Court in *Karam Singh* v *Menteri Hal Ehwal Dalam Negeri, Malaysia*,[4] it is not open to me to consider either the question whether there was reasonable cause to make the detention order or the protestations of innocence of the applicant.

I would conclude by quoting the following passage from the judgment of Tan Sri Abdul Hamid Ag LP in the recent case of *Minister for Home Affairs, Malaysia & Anor* v *Karpal Singh*[5] when speaking for the Supreme Court:

> In other words, reasonable cause is something which exists solely in the mind of the Minister of Home Affairs and that he alone can decide and it is not subject to challenge or judicial review unless it can be shown that he does not hold the opinion which he professes to hold.

In the result, the application must be and is dismissed.

Application dismissed.

Solicitors: *Chooi Shee Hong & Gan.*

Reported by *Ng Sheau Jiuan*

Low Thim Fatt v Public Prosecutor

HIGH COURT (KUALA LUMPUR) – FEDERAL TERRITORY CRIMINAL APPEAL NO CR 52-54 OF 1986
ZAKARIA YATIM J
12 NOVEMBER 1988

Criminal Procedure – Identification at identification parade made after prosecution witness had opportunity to see accused at police station – Whether evidence of identification vitiated

Criminal Procedure – Accused elected to remain silent at close of prosecution case – No witnesses called for defence – Trial judge disallowed defence counsel to make further submission after defence was called – Whether defence counsel entitled to make further submission

Criminal Procedure – Sentencing – Ten years' imprisonment and five strokes of whipping for robbery offence – Whether sentence manifestly excessive – Penal Code (FMS Cap 45), ss 34, 392 & 397

The appellant and two other persons were jointly charged in the Sessions Court with three offences of robbery under ss 392, 397 and 34 of the Penal Code (FMS Cap 45). The appellant was subsequently convicted and sentenced to ten years' imprisonment and five strokes of whipping on each charge. The sentences of imprisonment were ordered to run concurrently but to run consecutively with an earlier sentence passed by the court in respect of another charge. The appellant appealed against his conviction and sentence. The main grounds of his appeal were: (a) the identification parade where PW2 (a prosecution witness) identified the appellant was irregular because, before PW2 attended the identification parade, she was asked by the police to peep through the glass in the door to see whether the appellant was the one who pointed the gun at her; (b) the learned president was wrong in law in that once the defence was called and the appellant elected to remain silent, the learned president did not allow counsel for the appellant to make a submission on the totality of the evidence as a whole and held that the submission at the close of the prosecution case had sufficed; (c) the sentence passed by the learned president was excessive and that she erred in law when she ordered that the sentences were to run consecutively with an earlier sentence passed by the court in respect of another charge.

Held, dismissing the appeal:

(1) The identification of the appellant at the identification parade after PW2 was asked to peep through the door to confirm that it was the appellant who pointed the gun at her was highly irregular. Since PW2 had the opportunity to see the appellant beforehand, the evidence of her subsequent identification at the parade was vitiated. However, there is nothing in the evidence to show that the identification of the appellant by two other prosecution witnesses was improper.

(2) The learned president was right in refusing to allow counsel to make any further submission after the defence was called.

(3) Bearing in mind all the mitigating factors on the one hand, the public interest on the other, and all the circumstances in this case, the sentence passed by the learned president was not manifestly excessive. The learned president rightly applied the deterrence principle in passing sentence in this case. The order that the sentences of imprisonment were to run consecutively from the existing sentence in respect of another charge is set aside since the conviction and sentence on that charge was quashed.

Cases referred to

1 *Chang Kim Siong* v PP [1968] 1 MLJ 36 (folld)
2 *Wong Heng Fatt* v *PP* [1959] MLJ 20 (folld)
3 *Ng Hoi Cheu & Anor* v *PP* [1968] 1 MLJ 53 (not folld)
4 *PP* v *Sanassi* [1970] 2 MLJ 198 (folld)
5 *PP* v *Lee Tak Keong* [1989] 1 MLJ 307 (refd)

Legislation referred to

Penal Code (FMS Cap 45) ss 34, 392, 397

C Sequerah for the appellant.
Cik Siti Zainab Omar (Deputy Public Prosecutor) for the Public Prosecutor.

Cur Adv Vult

Zakaria Yatim J: The appellant and two other persons were jointly charged in the Sessions Court with three offences of robbery under ss 392, 397 and 34 of the Penal Code. The three charges are as follows:

> *Tuduhan Pertama*
> Bahawa kamu pada 28/6/1984, jam lebeh kurang 10.30 pm, di rumah No 145, Jalan Peel, Cheras, dalam Wilayah Persekutuan, Kuala Lumpur, bersama-sama seorang yang maseh bebas, dengan niat yang sama, telah melakukan samun ka atas seorang penama Chee Hai Piau KP 4445391(B), di atas barang, wang tunai $400, Kad kenalan 4445391 kepunyaan Chee Hai Piau, bag James Bond berharga $100, sebuah kereta Volvo WAJ 358 berharga $36,000,